Saturday, November 10.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

MACKENZIE *v.* MUNRO.

Sheriff--Process--Time for Lodging Defences —Decree in respect Defences Not Lodged —Sheriff Courts (Scotland) Act 1876 (39 *and* 40 *Vict. cap.* 70), *sec.* 16—*Reduction —Reponing.*

Section 16 of the Sheriff Courts Act of 1876 provides that, where a defender intends to state a defence, he shall enter appearance before the expiration of the *inducice*, and shall lodge defences on the first Court-day after, or at the latest at an adjourned diet not later than seven days after, the expiration of the *inducice*.

In an action of summary removing, the Sheriff on 17th July granted warrant to cite the defender on an *inducice* of forty-eight hours. The 19th of July was a holiday, and the Sheriff-Clerk's office was closed. The defender entered appearance upon the morning of the 20th, but upon the same day, and before the hour at which the Sheriff-Clerk's office closed, the Sheriff granted decree of removing in respect the defender had failed to lodge defences.

Held (*aff.* judgment of Lord Kincairney) (1) that the decree was incompetent, as at the earliest the time for lodging defences did not expire until the close of office hours on the 20th; and (2) that an action of reduction was the proper remedy, as the decree had been immediately extracted, and the defender could not be reponed.

Cessio — Crofter—Trustee—Title to Sue— Title of Trustee on Crofter's Estate to Sue Action of Removing against Crofter.

Decree of cessio was granted against a crofter, but no disposition *omnium bonorum* was granted in the trustee's favour, and accordingly he was not vested in the crofter's heritable estate.

Held by Lord Kincairney that he had no title to sue an action of removing against the crofter.

Opinion by Lord Trayner to same effect.

Process — Crofter — Cessio — Decree of Removing Obtained by Trustee on Crofter's Estate--Competency--Reduction--Crofters Holdings (Scotland) Act 1886 (49 *and* 50 *Vict. cap.* 29), *secs.* 1 *and* 3.

The trustee appointed in a process of cessio brought against a crofter raised an action of summary removing against the crofter, and obtained decree in absence. *Held* by Lord Kincairney that the decree was incompetent, in respect that it did not proceed upon a declarator of breach of any of the statutory conditions of the crofter's tenure.

This was an action by James Mackenzie, crofter, Westhill, Culloden, against David Munro, solicitor, Inverness, for reduction of a decree in an action of removing obtained by the defender against the pursuer in the Sheriff Court at Inverness.

The circumstances in which the pursuer sought reduction of said decree were as follows—Upon April 13th 1893 Munro was appointed trustee upon the estate of Mackenzie, under a petition for cessio presented by his landlord Duncan Forbes of Culloden. Without having obtained any disposition *omnium bonorum* from Mackenzie, Munro presented a petition in the Sheriff Court at Inverness for warrant to eject him from his croft.

Upon 17th July 1893 the Sheriff-Substitute (BLAIR) pronounced this interlocutor: —"Grants warrant to cite the defender on an *inducice* of forty-eight hours, and ordains the defender if he intends to show cause why the prayer of the petition should not be granted to lodge in the hands of the Clerk of Court at Inverness a notice of appearance within the *inducice* of citation hereon, under certification of being held as confessed."

The petition was served upon the defender the same night. The 19th day of July was a public holiday in Inverness, and (as was admitted in the Inner House) the Sheriff-Clerk's office was not open, but upon the morning of 20th July the defender lodged notice that he entered appearance "to defend said action." Upon the same day, before the hour for closing the Sheriff-Clerk's office, the Sheriff-Substitute, "on the motion of the pursuer, and in respect the defender has failed to lodge defences," granted warrant of summary ejection in terms of the prayer of the petition.

This interlocutor was extracted the same day, viz., 20th July 1893. Mackenzie appealed to the First Division of the Court of Session, but as the decree had been extracted he abandoned the appeal.

The warrant of ejection was executed upon 25th July, and Mackenzie and his family were turned out of the croft.

Upon 18th April 1894 Mackenzie raised the present action against Munro to have the decree of ejection reduced.

The pursuer pleaded—"(2) The said decree is reducible in respect (1) it was pronounced in an action at the instance of a person who had no title or interest to insist in the same; (2) that the procedure following on the petition in said action was incompetent, and contrary to the provisions of the Sheriff Courts (Scotland) Act 1876; and (3) that it was contrary to the terms of the Crofters Act."

The defender pleaded--"(2) The pursuer's estates having been sequestrated, the defender as trustee thereon was entitled to have him summarily removed from his holding. (3) The decree of ejection having been properly and regularly obtained, the action should be dismissed. (4) The pursuer having been ordained to execute a disposition *omnium bonorum* in favour of the defender as trustee for creditors, and the pursuer's interest in said holding being part of his estate, the defender was en-

titled to take possession thereof and eject the pursuer therefrom."

The Sheriff Courts (Scotland) Act 1876 (39 and 40 Vict. c. 70) provides, sec. 16—"Where the defender intends to state a defence he shall enter appearance by lodging with the sheriff-clerk, before the expiration of the *inducicæ*, a notice in the form of Schedule (B) annexed to this Act, and he shall, on the first Court-day after the expiration of the *inducicæ*, or at the latest at an adjourned diet not later than seven days after the expiration of the *inducicæ*, lodge defences with the sheriff-clerk."

Upon July 11th 1894 the Lord Ordinary (KINCAIRNEY) pronounced this interlocutor:—"Having heard counsel for the parties in the procedure roll, Sustains the second plea-in-law for the pursuer, and repels all the pleas-in-law for the defender: Therefore reduces, declares, and decerns in terms of the conclusions of the summons, &c.

"*Opinion*— . . . (1) The first objection to the proceedings in the Sheriff Court is that the pursuer of the petition for ejection had no title to sue. He was the trustee in a process of cessio brought against the pursuer. The proceedings in the cessio have not been produced, but it appears to have been presented by Mr Forbes of Culloden, landlord of the crofter, who according to the averment of the pursuer—not explicitly denied by the defender—was the sole creditor. The pursuer states that this process of cessio was really a device by the landlord for the purpose of getting rid of the pursuer as his crofter. But as to that I have no knowledge. I only know that the only pursuer of the petition for ejection was the trustee in the cessio.

"No disposition *omnium bonorum* has been granted by the pursuer. The trustee has therefore never been vested in the pursuer's heritable estate—Debtors Act 1880 (43 and 44 Vict. c. 34), sec. 9, sub-sec. 5. Now, I do not think it doubtful that the interest of a crofter in his croft is of a heritable character. His right may not be a right of property, but it is a heritable right, in the same way as the right of a tenant to a lease—to which the right of a crofter is assimilated by the Crofters Holdings Act—is heritable. Therefore the right of the crofter in his croft did not pass or belong to the trustee in the cessio.

"The tenancy would, I apprehend, not have passed to the trustee even by a disposition *omnium bonorum*, because section 6 of the Crofters Holdings Act 1886 provides that a crofter 'shall have no power to assign his tenancy.'

"Therefore, when the trustee presented the petition for ejection, he was not in right of the tenancy. Not being either landlord or disponee or assignee of the tenant, judicial or otherwise, I fail to see what title he could have to possess the croft or to pursue the petition. The prayer of the petition is not for access to the croft in order to obtain possession of the moveables on it, but is in the ordinary terms of a petition for ejection, and prays for warrant for 'summarily ejecting and removing the defender (*i.e.*, the crofter) and his goods and gear from the croft belonging to the pursuer as trustee for behoof of the defender's creditors, to the effect that the pursuer or others in his right may enter thereto and peaceably possess and enjoy the same.'

"The subsumption that the croft belonged to the trustee in the cessio is, I apprehend, a total mistake vitiating the proceedings.

"I cannot find in the Crofters Holdings Act any ground for holding that a crofter can be removed by anyone except a landlord. Whether in any case a crofter could be removed at the instance of the trustee on his sequestrated estate is not the point which now arises, and need not be considered, but I have great difficulty in seeing that he could.

"It is probably true that the landlord was a consenting or rather an acquiescing party in these proceedings against the crofter. It is possible that they may have been adopted at his request and in his interest, but as to that I have no knowledge. He is not a consenting party to the petition, and his wishes have no bearing on the question as to the truster's title to sue.

"It was ingeniously argued that it was the duty and right of the trustee to recover any compensation which might become due under section 8 of the Crofters Act, and as the crofter's right to compensation could only arise on his removal from the holding, the trustee was entitled to remove the crofter as a measure beneficial to the creditors and necessary for the purpose of realising the crofter's moveable estate. If it be true that the landlord was the sole creditor, this would imply that the trustee's right and duty was to remove the crofter in order to recover for the landlord a claim against the landlord, which is an absurdity. But, suppose there were other creditors, the mere fact (if it were true) that the removal of the crofter would be for their benefit cannot confer on the trustee a power of removal which the statute does not confer.

"I am therefore of opinion that the trustee had no title to sue the action of ejection.

"2. It is pleaded that the proceedings in the Sheriff Court were incompetent, and contrary to the provisions of the Sheriff Court Act. The facts which raise this plea are these—

"The Sheriff-Substitute granted warrant to cite the defender on 17th July 1893 on an *inducicæ* of 48 hours. The petition was served between eight and ten o'clock on the evening of the 17th, and on the 20th July the Sheriff-Substitute pronounced this interlocutor, 'In respect the defender has failed to lodge defences, grants warrant of summary ejection.

"Now, it is averred by the pursuer that the 19th of July was a public holiday in Inverness, and that the Sheriff-Clerk's office was not open, and that a notice of appearance was lodged on the following day, the 20th; and the intimation of appearance is in point of fact a part of the process, and is included in the inventory

of process. It is averred that the notice of appearance was timeously lodged, and that the defender (present pursuer) was therefore thereafter entitled to lodge defences, for which the time had not expired, and that the Sheriff was not entitled to decern against him as in absence.

"The defender says that the notice of appearance was lodged after the interlocutor was pronounced, and was received and marked by the Sheriff-Clerk by mistake.

"If the interlocutor of the Sheriff-Substitute was a decree in absence, this point would depend I think on the truth of the averment that the Sheriff-Clerk's office was shut on 19th July—see *Henderson* v. *Henderson*, October 17, 1888, 16 R. 5. But that averment is not admitted. It appears to me, however, that the interlocutor was not a decree in absence, but a decree on default for failure to lodge defences, and it is admitted that defences were not due, and that there was no such failure. It appears to me that this interlocutor has been blundered, and that this mistake is also fatal.

"3. It is pleaded that the decree was contrary to the terms of the Crofters Act. The removal of crofters is provided for in the 3rd section of that Act, and it is enacted that a crofter shall be liable to be removed when one year's rent of the holding is due, in the manner provided by section 27 of the Agricultural Holdings Act 1883, which does not authorise a summary removal, or in case of two years' rent of the holding being due, or of breach of a statutory condition (which may be held to have been committed in this case) in the manner provided by the 4th section of the Act of Sederunt of 14th December 1756. That section provides that it shall be lawful to the setter or heritor to declare the irritancy incurred, and to insist on a summary removing, and that the Sheriff may declare the irritancy incurred and decern in the removing. That section does not appear to me to authorise a decree of summary ejection not proceeding on any declarator of breach of the statutory conditions at the instance of a trustee in the crofter's cessio, and I think that is wholly unauthorised." . . .

The defender reclaimed, and argued—1. The decree of ejection had been properly obtained in the Sheriff Court, and, even if it had been improperly obtained, it had been implemented, and could not now be gone back upon. It was admitted that upon the 19th July, when the *inducice* expired, the Sheriff-Clerk's office was shut, and that notice of appearance could not be given until the next day, but that day was the first Court-day after the expiration of the *inducice*, and the defender was bound to lodge defences on that day in terms of the Sheriff Courts Act 1876; he had not done so, and the Sheriff-Substitute had properly granted decree. If he had desired time to lodge his defences he ought to have appeared in Court and asked for an adjournment of the diet, but the word "adjourned" necessarily implied the intervention of one of the parties; the diet was not adjourned merely because the day upon which the *inducice* expired was a Court-day. As this was a decree in absence, the proper course for the defender to take was to have asked to be reponed in the Sheriff Court, and not to bring an action of reduction in the Court of Session nearly a year after the date of the decree—*Marjoribanks* v. *Borthwick*, Feb. 18, 1857, 19 D. 474. 2. It was true that the decree granting cessio did not carry heritage, and the right of the crofter was heritable, but by it the crofter was ordered to grant a disposition *omnium bonorum*. It was his duty to grant that disposition, and, if he did not do so, he could not object to a fault in the trustee's title which arose from his own failure to do his duty. 3. The disposition would have conveyed the crofter's right to his tenancy in spite of the clause in the Act forbidding assignation of the tenancy. The crofter could be removed from his croft by his landlord for breach of certain conditions stated in the Act, and if the landlord did not object, then the trustee could enter upon the tenancy and claim the compensation for improvements made by the crofter for the benefit of the crofter's creditors. The debtor was in fact in the same position as a person holding under an ordinary lease with a clause forbidding assignation of the lease, but that lease could be assigned with the landlord's consent. The crofter had committed an act of notour bankruptcy, for which breach of conditions in the Act he might be removed from the croft, and if the landlord was willing to treat the trustee as assignee he might be allowed to do so.

The pursuer argued—(1) The procedure in the Sheriff Court was plainly incompetent. The warrant of citation called upon the defender to lodge appearance within forty-eight hours. It was admitted that the Sheriff-Clerk's office was shut when the *inducice* expired, and that the defender had lodged his notice of appearance at the earliest possible date, but notwithstanding that the Sheriff-Substitute had granted decree on the ground that the defender had not lodged defences. The time for lodging defences did not expire until seven days after the date of lodging the notice of appearance if a Court-day did not come sooner; it was absurd to suppose that because the day for lodging notice of appearance happened to be a Court-day defences must be lodged on that day. Even taking the restricted reading of the statute claimed by the defender in this case, the procedure was incompetent, because the whole day, at least during office hours, must be allowed for lodging defences; here it was admitted that the decree was given in the forenoon, before the close of office hours, and in the knowledge that notice of appearance had been given. The defender could not be reponed, because the decree had been extracted on the same day as it was pronounced, and the ejection carried through a few days afterwards when the defender was away from home—*Stephenson* v. *Dobbins*, February 17, 1852, 14 D. 510. As he could not be reponed the decree must be got out of the way in some manner, and an action of reduction was competent—*M'Lachlan* v. *Rutherford*,

June 10, 1854, 16 D. 937. (2) It was plain that the pursuer had no title to sue the action of ejection. It was true he was trustee under a decree of cessio, but the decree only operated an assignation of the debtor's moveables to him, and no disposition *omnium bonorum* had been executed in his favour, so that there had been no assignation of what was admittedly an heritable right. If the trustee found that the debtor would not execute such a disposition, he could either put him in prison or do what was often done, viz., turn the cessio into a sequestration, and then he would get the heritage into his hands, but here the trustee had done neither of those things, and yet had not got a disposition *omnium bonorum*. It was decided that a petition for ejection was bad unless it was averred that the person to be ejected was possessing without a title, or that the possession was precarious—*Hally* v. *Lang*, June 26, 1867, 5 Macph. 951; *Scottish Provident Investment Company Building Society* v. *Horne*, May 31, 1881, 8 R. 737. 3. Even assuming that the pursuer in the action of ejection had a title, he could get no good from it, because by the Crofters Holdings (Scotland) Act 1886 (49 and 50 Vict. cap. 29) the crofter could not assign his tenancy, and without the tenancy the trustee could not enter upon the land or get any advantage from it. The same principle applied as if the crofter had granted a trust-deed for behoof of creditors, which he was forbidden to do by the Act. In that case the deed would have been a nullity, and so would an assignation of the crofter tenancy have been.

At advising—

LORD JUSTICE-CLERK—Several questions were debated before us in this case. The first question was, whether the case of this crofter was properly dealt with in the Court below? The action in the Sheriff Court was raised by the defender in this action against the pursuer to have him ejected from his croft. The action was served upon him, the warrant for service containing an intimation to him that if he wished to defend the action he must lodge a notice of appearance within forty-eight hours after service.

The day during which the last hours of the forty-eight expired was a holiday in Inverness, and the Sheriff-Clerk's office was not open on that day, so that it was impossible for him to hand in the notice in time, according to the warrant. He did, however, what was the next best thing, he handed in the notice on the morning of the 20th, and it is not disputed that the notice was lodged in time. The question therefore is, whether the crofter was bound before the expiry of the 20th July, or at anyrate before the end of the sitting of the Court, to lodge defences to the action? I think there is no ground for holding that if he was entitled to lodge the notice of appearance, that he was bound to hand in defences at the same time. He certainly could not be in default if he lodged defences during office hours on that day.

The crofter having lodged the note of appearance, the Sheriff-Substitute upon the same day, 20th July, and without waiting to see whether defences were tendered at the Sheriff-Clerk's office, pronounced an interlocutor by which he found that the defender had failed to lodge defences, and granted warrant of summary ejection, and it is this decree which is now under reduction. I think that interlocutor cannot stand, because I hold that at the very least it was in the power of the defender to lodge defences during office hours in the Sheriff-Clerk's office on the 20th July.

That ground of judgment is sufficient for the decision of this case, and it appears to me that the Lord Ordinary was right in holding that the decree ought not to have been pronounced, and that the defender, the pursuer in this action, is entitled to have it removed as against him.

There are two modes in which the effect of that decree could have been got over—the first is by a motion to the Sheriff to be reponed, and the second is by an action of reduction of the decree.

Any attempt by the pursuer in this case to be reponed in the Sheriff Court action would not have been satisfactory or indeed effectual, because immediate extract was taken of the decree, and then within a very few days, and without the knowledge of the pursuer, the ejection was carried through. There remains an action of reduction. I am of opinion that the action of reduction is competent; the Lord Ordinary has decided that the decree should be reduced, and I think his interlocutor should be sustained as the pursuer has stated sufficient ground for his case.

I do not desire to express any opinion on the other grounds of reduction stated by the Lord Ordinary, except to say that the arguments in favour of reduction on these grounds appear to me of great weight.

LORD RUTHERFURD CLARK—I agree that this decree was irregularly taken, and must be reduced. I do not wish to express any further opinion. I may say that I have the greatest possible doubt whether the defender here had any title to sue the action of ejection in the Sheriff Court.

LORD TRAYNER—I agree. I think the defender in this case had no title to sue the action of ejection, and while it may be difficult to hold that he could get such a title as he sought by any process of law, I am sure he had no title at the time the action was raised. I would have been prepared to support the Lord Ordinary's interlocutor on that ground. I agree, however, that it is not necessary to decide that question, for it is certain that the proceedings in the Sheriff Court were irregular and contrary to statutory enactment, and cannot stand.

LORD YOUNG was absent.

The Court pronounced this judgment:—

"Recal the interlocutor: Sustain the second branch of the pursuer's second plea-in-law, and reduce, declare, and

decern in terms of the conclusions of the summons."

Counsel for Pursuer—Salvesen—W. Thomson. Agent—Thomas M'Naught, S.S.C.

Counsel for Defender—H. Johnston—P. J. Blair. Agents—Skene, Edwards, & Garson, W.S.

Tuesday, November 13.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

PURNELL *v.* SHANNON.

Assignation, Absolute or in Security—Construction—Proof—Parole.

A debtor assigned to his creditor an extract-decree which he held against a third person. By the terms of the assignation he assigned, conveyed, and made over to and in favour of his creditor "all my right, title, and interest in the extract-decree, . . . with full power . . . at any time to use said decree in any manner of way whatever, in the same way as I could have done before granting thereof, in satisfaction of his claim against me." The assignation was intimated to the third party, and the monthly instalments due by him under the decree were paid by him to the assignee till the amount due to the latter by the assignor had been paid.

Held (1) that the assignation was absolute, and not merely in security of the debt due by the assignor to the assignee, and (2) that an alleged understanding modifying its terms could not be proved by parole.

Henry Amor Purnell, being indebted to John Shannon, assigned to him an extract-decree which he held against Robert Reid for payment of £337, 10s. in monthly instalments of £4. The terms of the assignation were as follows—"I, Henry Amor Purnell, engineer, of Glasgow and Edinburgh, presently residing at 105 Hill Street, Garnethill, Glasgow, in consideration that I am due my workman at Edinburgh, named John Shannon, residing at 43 Deanhaugh Street, Edinburgh, (1) the sum of £20, 10s. sterling as wages, as at 25th April last, and (2) £19, 13s. 9½d. sterling, as money lent to me by him to pay bills and accounts due by me to creditors prior to November 30th 1891, Do hereby assign, convey, and make over to and in favour of the said John Shannon all my right, title, and interest in the extract-decree obtained at my instance in the Sheriff Court at Glasgow against Robert Reid, bank clerk, residing at No. 11 Huntly Terrace, Kelvinside, Glasgow, with full power to the said John Shannon at any time to use said decree in any manner of way whatever, in the same way as I could have done before granting thereof, in satisfaction of his claim against me, and I have delivered up to the said John Shannon the extract-decree above referred to. Written and signed by me at Glasgow upon the 23rd day of May 1892."

Intimation of the assignation was duly made by Purnell to Reid, and thereafter Reid continued to pay the instalments due by him under the decree to Shannon until the amount due to the latter by Purnell had been paid.

Purnell then applied to Shannon for a reconveyance of the assignation, and, on Shannon refusing to comply with the application, he raised the present action against him on 14th August 1893. The summons concluded for declarator that the document was "merely an assignation by the pursuer to the defender of the said extract-decree in security for the said sums of money, and that the said sums of money having been paid to the defender, with interest thereon," the defender should be ordained to denude of the extract-decree and reconvey it to the pursuer. A further conclusion for reduction of the assignation on the ground of essential error was subsequently added by way of amendment.

The pursuer averred, *inter alia*, that it was distinctly understood between him and the defender that the document merely constituted a security.

The defender denied that the assignation was merely one in security, and pleaded—"(2) The said assignation cannot be explained or modified by parole proof."

On 14th March 1894 a proof *habili modo* was allowed by the Lord Ordinary. The pursuer failed to prove that when he granted the assignation he was under any error as to its legal import. Evidence was led to show that there was an understanding between the parties that when the assignee's debt had been satisfied he should execute a reconveyance, but this evidence was held inadmissible, since it did not amount to the writ or oath of the defender.

On 2nd June 1894 the Lord Ordinary assoilzied the defender.

"*Opinion.*—There are several questions in this case, questions both of fact and of law, and for the reasons explained in my previous judgment I thought it best after hearing parties in the procedure roll to allow a proof to both parties *habili modo*. That proof has now been led, and I have to decide the case as a whole.

"The first question is as to the construction of the document. Does it import an absolute assignation of the decree to which it refers, or is it only an assignation in security, or what comes to the same thing, an assignation for a limited purpose to enable the defender, the assignee, to recover under it certain sums due to him by the pursuer?

"It must be admitted that the deed is peculiarly expressed. It was drawn, it appears, by the witness Mr Waugh, an accountant's clerk in Edinburgh, and perhaps its legal effect may admit of argument. On the whole, however, I do not see my way to construe it otherwise than an absolute deed. It purports to assign the decree to which it refers to the defender John Shannon 'in satisfaction of his claim against me,' or (including what I rather take to be a parenthesis) it assigns the